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NO. 84-594

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALVIN W. SMITH, PETITIONER,

VS.

HONEYWELL INC. AND
HONEYWELL INFORMATION SYSTEMS INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO RESPONDENTS BRIEF IN OPPOSITION

Petitioner, pro se,

Alvin W. Smith
8143 14th Avenue South
Bloomington, Minnesota, 55420
612-854-2726 (Home)
612-482-4870 (Work)

54pp

QUESTIONS PRESENTED

1. Whether and to what extent did the Respondents' statement of the case not represent the evidence.

2. Whether and to what extent did the Respondents not accurately state the reasons for Petitioner being forced to act pro se.

3. Whether and to what extent did the Respondents not clearly state the circumstances of the unjust disparagement of the Petitioner pro se while on the witness stand by the U.S. Court.

4. Whether and to what extent did the Respondents not clearly show that the U.S. District Court did not present the entire case to the jury.

5. Whether and to what extent did the Respondents not show the deviation from evidence in the U.S. District Court's Findings of Fact under Title VII, 42 USC Sec. 2000e et seq. (Civil Rights Act of 1964).

6. Whether and to what extent did the respondents misrepresent the error when the U.S. District Court instructed the jury to determine the state of the mind rather than examine the purposeful acts under the Civil Rights Act of 1866 (42 USC Sec. 1981).

THE PARTIES

The Petitioner

The petitioner, Alvin W. Smith (hereinafter referred to as petitioner or Smith) is a Vietnam War veteran honorably dischaged as a Captain in the Military Police Corp. The petitioner has a B.S. in mathematics, some graduate applied mathematics, a M.B.A. from the University of Minnesota, and a J.D. from William Mitchell College of Law in Minnesota. Petitioner is not an attorney but rather an expert in computer business. Petitioner is presently employed by Control Data Corp. in Minnesota as a consultant in supercomputer software development. Petitioner is a member of the Negro Race.

The Respondent

The respondent Honeywell, Inc. and its wholly owned subsidary Honeywell Informaton Systems, Inc. (both hereinafter referred to as respondents or Honeywell) is a multinational Minnesota based Corporation. Respondent is a major and influential employer in Minnesota.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 735 F.2d 1067. The opinion of the United States District Court for the District of Minnesota is unreported. Both opinions have been filed in the briefs of the petitioner and respondents.

JURISDICTION

The judgement of the U.S. Court of appeals for the Eighth Circuit (hereinafter referred to as the Court of Appeals) was entered on June 4, 1984. The denial of the petition for rehearing in the Court of Appeals was entered on July 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). This petition is submitted because:

1. The Court of Appeals has sanctioned a lower court's departure from accepted judicial procedure and fairness necessitate a call for the U.S. Supreme Court's power of supervision.

2. The Court of Appeals has decided not to address an important question of federal law and which should be decided by the U.S. Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Civil Rights Act of 1866, 42 U.S.C. Sec. 1981 (hereinafter referred to as Section 1981) is a codification of the

Thirteenth Amendment to the U.S. Constitution provides:

> "All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishemnts, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e. et seq. (hereinafter referred to as Title VII) provides:

> "Sec. 703. (a) It shall be unlawful for an employer...(1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his composition, terms, conditions, or privileges of employment, because of such individual's race, color...or (2) to limit, segregate or classify his employees...in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be cause of such individuals race, color, religion, sex, or national orgin."

STATEMENT OF THE CASE

This is an individual action for race discrimination for violation of Title VII and Section 1981. Petitioner brought action against respondents for fraudent employment, wrongful termination and employment discrimination.

Petitioner was fraudently hired by the respondents from a competitive company. He suffered disporportinate racial discrimination in assignment of responsibilities, office space, preformance appraisals, salery treatment, promotional opportunities, use of employment benefits (i.e. vacation, etc.), job responsibilities, another segregated office and involuntary termination. There is no direct evidence of petitioner not performing his job.

On August 12, 1980, petitioner filed a charge of discrimination against respondents with the U.S. Equal Employment Opportunity Commission (hereinafter referred to as the EEOC). Honeywell (a large government

contractor) refused to answer the questioner of the EEOC. Whereupon, the frustrated EEOC on April 14, 1981 not able to investigate the complaint in a timely fashion, issued a Right to Sue under Title VII.

This case was filed on June 2, 1981 by petitioner's then attorney, Mr. Steven M. Goldfarb, in the United States District Court in Minneapolis, Minnesota. The case was assigned to U.S. Judge Edward Devitt (hereinafter referred to as Judge Devitt) of the U.S. District Court in St. Paul Minnesota. On May 14, 1982, the case was referred to U.S. Magistrate Patrick C. McNulty (hereinafter referred to as the Magistrate) of the U.S. Court in Duluth, Minnesota.

The complaint initially consisted of five counts of employment related matters. In early 1982, Judge Devitt dismissed Count V (Unlawful Termination) as being beyond the court's pendant jurisdiction. On October 13, 1984, the Magistrate recommended dismissing Counts I (Fraudent Em-

ployment), III (minnesota Human Rights) and V (Minnesota Statute) as beyond the Court's pendant jurisdiction.

On October 25, 1982 (the last date to move against the Magistrate's recommendation), petitioner's attorney of 18 months abandoned this case without the permission of the court and in violation of the employment contract. Petitioner could not find another attorney willing to take the case close to trial and was forced to act as his own lawyer in all further legal action in this case. Petitioner is not a lawyer but rather a computer expert. The incompetent presentation at trial was noted by the Magistrate.

On December 6, 1982, Judge Devitt ruled against petitioners motion against the magistrate's recommendations. All of the counts dismissed in federal courts are being litigated in state courts.

On December 14, 1982, this action was referred to the Magistrate for trial with appeal to the Court of Appeals. The trial started on February 7, 1983 and lasted for

8 days. Count II (Title VII) was tried to the bench and Count IV (Section 1981) was tried to the jury.

Petitioner was forced to represent himself at trial. Petitioner did hire a lawyer to question petitioner while he was on the witness stand and provide sporadic trial consultation. Respondents was represented by 2 full time attorneys.

Petitioner lost the jury verdict 7 to 8. The Magistrate subsequently ruled against the petitioner for the portion tried to the bench.

Petitioner thereafter moved for judgement notwithstanding the verdict, for new trial of the 1982 issue, to amend the Court's findings of fact and for new trial of the Title VII issue. On May 5, 1983, these motions were denied by the Magistrate.

Petitioner then appealed to the Cour of Appeals. On June 4 1984, after not having oral argument, the appeal was summarily denied. Petitioner then requested the Court of Appeals rehear the evidence of errors

in the findings of fact and rehear en banc the issue of proof of Section 1981 discrimination. On July 17, 1984 the Court of Appeals denied both of these request for rehearing.

REASON FOR GRANTING THE PETITION

Petitioner submit that the U.S. Supreme Court should exercise its power of supervision over a lower court to insure that; (!) a district court must not condone an attorney abandoning his client without the court's permission thereby prejudicing his client's right of action, (2) a district court must not make disparaging remarks in the presence of the jury which would have the effect of influencing the jury against the individual forced to represent himself, (3) a district court must present to the jury all of the issues in the complaint supported by evidence and not a substantial subset, (4) a district court's findings of fact must be based on the evidence presented at trial, and (5) a district court in a Title VII case must consider evidence of

pretext.

In general, each of the above items for consideration has a potential of falling under the penumbra of judicial discretion when taken as a whole has the effect of a departure from the standard of substantial justice.

Petitioner further submits that in Section 1981 cases, the jury must be directed to evaluate the purposeful harmful acts of discrimination and not the mental state of the discriminator.

1. THE RESPONDENT'S STATEMENT OF THE CASE DOES NOT REPRESENT THE EVIDENCE.

Respondents' statement of the case is based upon the U.S. Magistrate's findings of fact. As shown in the petition and later in this reply, those findings of facts are erroneous because it simply does not consider the evidence in the record. Therefore respondents statement of the case is also erroneous.

Of particular note is respondents' statement on page 6 that there were "business reasons" to justify their behavior. It was

shown in the petition (pages 35 to 41) and in this reply (pages 23 to 26) that these pretextual business reasons represeted a departure from Honeywell's policies and treated a black employee substantially different than a white employee.

Therefore this Court should not consider Respondents statement of the case as an accurate representation of the evidence in the record.

2. THE RESPONDENT DID NOT ACCURATELY STATE THE REASON FOR PETITIONER BEING FORCED TO ACT PRO SE.

On page 7, Honeywell stated "the petitioner...voluntarily consented to substition of himself for his attorney". How does Honeywell know what took place between the petitioner and his attorney? That relationship is supposed to be confidential.

In fact, the respondent was forced to represent himself because his attorney refused to preceed with this case. On page 30 of the appendix is the motion in which the petitioner informed the District Court that his attorney refused to proceed with this

case and was forced to act pro se. The attorney never asked the permission of the court nor was there any steps taken on the part of the District Court to stop the misrepresentation.

It is a long standing rule that leave of the court is necessary before an attorney may withdraw from a case, U.S. v. Curry, 47 U.S. 106 (1848). The courts and the Code of Professional Responsibility require the attorney to seek permission from the Court and take steps to avoid foreseeable prejudice, Summers v. Thompson, 444 F.Supp. 312 (Tenn 1978), Berry v. Berry, 388 A.2d 108 (Mo. 1978), Ashbrook v. Ashbrook, 366 N.E. 2d 667 (Ind. App. 1977), Code of Professional Responsibility DR 2-110(A).

The court must preserve the fairness of the adversary proceedings by requiring the attorney to seek its permission to withdraw from the case and to make the withdraw without prejudicing the client. Here the attorney abandoned the case just when a critical moition was to brought to the Court.

The U.S. District Court did not preserve the fairness and integrity of the adversary proceedings by permitting the attorney to abandon his client without its permission and in prejudice to his client's action.

Without adequate representation on both sides of this adversary proceeding the Court is not in a position to determine the facts of the case. This is illustrated here in the errors in the findings of fact.

The respondent stated on page 8 that the petitioner did not raise the issue on appeal. Rule 4(a)(4) of the Federal Rules of Appellate reads as follows:

> (4)If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgement under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact whether or not an alteration of the judgement would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgement; or (iv) under Rule 59 for a new trial,,,"

There is no provision for raising the issue of unfairness because the U.S. District Court permitted the attorney to abandon the case. Therefore the notice of appeal was

brought within the Federal Rules of Appellate Procedure by the pro se litigate. The prejudicial misconduct of the attorney was brought up for review in the Appellate Brief and the Petition for Rehearing (see pp 49-53 in the appendix). The U.S. Court issued a summary opinion in which the misrepresentation was not addressed.

Petitioner is not an attorney but rather a computer expert and is prone to misrepresent himself in these forced conditions like anybody else. This issue was presented to the lower courts. The respondent statement is not correct.

3. THE RESPONDENT DID NOT CLEARLY STATE THE CIRCUNSTANCES OF THE UNJUST DISPARAGEMENT IF THE PETITIONER PRO SE WHILE ON THE WITNESS STAND BY THE U.S. DISTRICT COURT.

On page 9 the respondent stated "the judge's reference to possible contempt came only after the petitioner continued failure to be responsive". Petitioner's answers were responsive to the best of his ability under the circumstances of being on the witness stand while being forced to act pro se and being questioned by an attorney not

a party to the case (he was there part time).

Fairness in Court demand that all parties be treated the same. An illustration of the unfairness is the testimony given by Mr. Griffin (the Honeywell supervisor) and referred to in the petition on page 70 but not published. That citation may be found in the appendix here on page 33 . In that testimony, Mr. Griffin (an attorney) was unresponsive to more that 20 question. in a short period of time. Yet there was no denouncement before the jury by the U.S. District Court for the behavior of the Honeywell supervisor. The U.S. District Court must be an impartial forum for the presentation of the evidence to the jury.

The respondent next state on page 9 that no authority was cited to support the petitioner claim of the unfair disparagement by the U.S. District Court. The implication being that it is alright for a U.S. District Court to disparage one of the parties in the action if no authority is cited. Honeywell is again incorrect. The authority is

appropriately cited on page 20 of the petition to this Court. Honeywell's statement is simply not true.

In summary, a U.S. District Court may not discredit or credit all or part of a witness and should not instruct one of the parties to reveal his trial tactics to the other side during trial.

4. THE RESPONDENT DID NOT CLEARLY SHOW THAT THE U.S. DISTRICT COURT DID NOT COMPLETELY PRESENT THE CASE TO THE JURY.

Honeywell stated on page 9; "A party is not entitled to have a jury instructed in a particular language of its choice". Obviously, the petitioner did not require that the jury be instructed in the "particular language of his choice". The petitioner (and the petition) simply asked that all of the issues in the complaint be presented to the jury.

The respondent stated on page 10 the "instructions taken as a whole were adequate to submit the substance of Smith's unlawful claim to the jury". As clearly shown in the petition, only 50% of the issues in the

complaint was presented to the jury. The issues which were not presented and potentially remain outstanding are:

1. Discrimination in compensation and benefits and the lack of a performance appraisal (discussed here on page 24 of this brief).
2. Discrimination in promotional opportunity (discussed here on page 24 of this brief).
3. Discrimination in responsibilities.
4. Discrimination in hiring.
5. Discrimination in use of vacation time.

These are not minor as Honeywell would have this Court believe but are major importance in employment discrimination. They are the types of acts the U.S. Congress specifically prohibited in Title VII with the words "discrimination in compensation, term, conditions and privilege of employment". In essence the major substance of the complaint was not even presented to the jury for consideration.

It is widely held that the court has a duty to submit all of the issues to the jury. Ranney v. Barlow, 112 U.S. 207 (1884), Herman v. Midland A.G. Service, Inc., 264 N.W.2d 161 (Neb. 1978), Cole v. Woods, 548 S.W.2d 640 (Tenn. 1977), Hasson v. Ford Motor Co., 564 P.2d 857 (Cal. 1977).

It is clear that there is a need for this Court to emphasize the necessity for the district court to submit all of the issues in a complaint to the jury and not some minor subset of chosen issues as recommended by Honeywell.

5. THE RESPONDENT DID NOT SHOW THE DEVIATION FROM EVIDENCE IN THE U.S. DISTRICT COURT'S FINDINGS OF FACT IN THE TITLE VII CASE.

Honeywell stated on page 11 that the petitioner's request that the findings of fact match the evidence "does not present a special or important issue to the court". Petitioner submit that the findings of fact must be supported by evidence and does present the special and important issue of constitutional fairness. The fundemental issue is justice. This Court should note

that Honeywell did not cite testimony to support the findings of fact nor did Honeywell cite testimony to support their business reason for their unconstitutional conduct.

One of the issues in the complaint was that Honeywell discriminated against the petitioner in compensation benefits in that the petitioner did not receive a Performance Appraisal in accordance with company policy during the last 22 months of employmenr. The U.S. District Court did not even address this issue in its findings of fact nor did the District Court present this issue to the jury.

Yet evidence was presented that Mr. Griffin (the Honeywell supervisor who is an attorney) gave the petitioner a Honeywell document which stated that a Performance Appraisal will be given at least once a year (Reference R1 page 40 in the appendix), that plaintiff's Caucasian coworker, Mr. Maidman, testified that he received a performance appraisal at least once a year (Reference R2 page 41 in

the appendix), that petitioner did not receive a performance appraisal within the last 22 months of employment (Reference R3 page 42 in the appendix), that the petitioner received lower and slower salery increases and the Caucasian co-worker received faster and higher salery increases (Reference R4 page 43 in the appendix), that at all times, petitioner was doing his job in a competent and noteworthy manner (Reference R5 page 45 in the appendix), and that the lack of performance appraisal would impede promotional growth (Reference R6 page 47 in the appendix).

Here there is a deviation from Honeywell policy and a difference in treatment of a black employee. The ommission of this issue in the findings of fact is also an error.

Honeywell on page 11 attempts to hide behind a high standard of review by stating "a findings of fact is not reversible unless it is clearly erroneous, nor is it necessary for the judge to make specific findings on

all facts or refer to every item of evidence". Clearly Honeywell would like to have this high standard of review to cover their mistreatment of the petitioner.

The U.S. Supreme Court stated in U.S. v. Gypsum Co., 333 U.S. 354 (1947) the following:

> "The findings were never conclusive however. A findings is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Here the mistake and error is glaring even for those who are not pro se litigants. Petitioner therefore submits that this Court must emphasize that Findings of Fact must be supported by evidence and the accuracy of the Findings of Fact does represent a special and important issue of fundemental justice.

6. THE RESPONDENT MISREPRESENTED THE ERROR IN THE SECTION 1981 JURY INSTRUCTION.

On page 12, Honeywell stated "the petitioner places great emphasis on his contention that he show the respondents intended (ie. had a purpose or motive)".

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In the petition there is an argument that there is a difference between intention and purposeful act. The basis of this argument is that by use of the word "intent" the trier is directed to evaluate the state of the mind of the perpetuator whereas in the use of the word"purposeful act" the trier is directed to evaluate the purposeful act of the perpetuator. Honeywell would have this Court believe that the act and the state of mind are ne and the same.

Clearly an individual may commit an act of harm against another without consciously being aware of their behavior. Yet the harm remains with the receiving party.

It is the act of harm (conscious or not) of racial discrimination which is unconstitutional under Section 1981. A culture may exist in which the act of racial discrimination will take place in the normal course of events without conscious awareness. Yet, there is still a victim.

Therefore Honeywell argument that intent is the same as purposeful act is not correct.

CONCLUSION

There are undoubtedly other individuals in this country without the education or fortitude to raise these issues of misrepresentation and have become victims of the lack of substantial justice. Therefore the petition for writ of certiorari should be granted.

Respectfully submitted.

Dated:
November 26, 1984

Alvin W. Smith
Petitioner, pro se
8143 14th Avenue South
Bloomington, Minnesota
55420
612-854-2726 (Home)
612-482-4870 (Work)

APPENDIX

Here set forth successively are portions of the motion against the U.S. Magistrate's Recommendations, relevant portions of the trial transcript, relevant portions of the Appellant Brief, and relevant portions of the Petition for Rehearing.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

Alvin W. Smith, Plaintiff

vs.

Honeywell, Inc., et al., Defendants.

MEMORANDUM OF LAW
Civ. No. 3-81-343

Due to the critical timing of this motion and the unprofessional behavior/ performance of the plaintiff past council "Steven M. Goldfarb", plaintiff has found it necessary to act as attorney "pro se" until such time as suitable council may be obtained...

Plaintiff brings this motion and not his past attorney Steven M. Goldfarb because the attorney in his desire to remove himself from this case refused to represent plaintiff in this time critical matter. This refusal is a violation of the Code of Professional Responsibility and mislead United States Magistrate Patrick McNulty

recommendation in his Memorandum Decision and Recommendation. A copy of plaintiff complaint to the Minnesota Lawyer's Board is attached.

Had plaintiff's past attorney acted as required, a motion to amend the complaint to include diversity jurisdiction would have been heard ...

Unfortunately, Mr. Goldfarb refused to make the motion at that time and subsequently refused to both cure the service defect and to seek to amend the Memorandum Decision and Recommendation...

This is not just a race discrimination case but rather a case between a conscientious employee and an abusive rich powerful employer. The employer, Honeywell Inc., has legions of lawyers and plenty of money to defend it's abusive tactics against it's employees. The plaintiff while rich with education has limited financial resources to prosecute Honeywell et al. in both Federal and State Courts. Yet, Plaintiff's sense of moral ethics dictate that not even a large

powerful corporation is above the law and must be held responsibility for it's wrong-doings in this society. As such, plaintiff request that the Court rule favorable upon these motions.

Dated:October 25, 1982.

/s/ Alvin W. Smith

TRIAL TRANSCRIPT: Vol. II, pg. 4, 11/8/83

Q:Mr. Griffin, now refer to Plaintiff's Exhibit Number 11.

A;Yes....line 7

Q:Excuse me. That appears to be a tuition reimbursement request?

A:Yes.

Q:And that was prepared by Mr. Smith?

A:Yes.

Q:They were signed by Mr. Smith, by you and Mr. Smith and others?

A:Technically they are not signed. Your name is printed on those.

Q:Was a signing or printing required?

A:Doesn't say...page 6 line 19

Q:Mr. Griffin, looking at the Plaintiff Exhibit Number 11, just for the sake of exercise canyou tell us the circumstances of the initial reauest that you received from the plaintiff?

A:What do you mean by circumstances?

Q:Was the plaintiff to submit to you a number of late tuition request, or was just one late tuition request submitted to you?

A:It was about the third, as I recall. It was after the fact rather than before the fact.

Q:So there was a third one over a period of how much time?

A:Three out of perhaps seven or eight in a period of about two years....line 13...

Q:Did the Honeywell policy require that absoultely the tuition request had to be submitted immediately after taking of the test, or immediately after receiving the exam, the grades?

A:Neither. The Honeywell policy stated the request had to be approved by the superior prior to the employee taking the course.

Q:Did Honeywell policy also require that that request had to be approved by the supervisor after taking the course?

A:Yeah, when the grades--if the employee passed the course with a grade high enough to qualify for the tuition reimbursement, the same request had to be submitted. It's a two-part form...line 21...

Q:Mr. Griffin, looking at Plaintiff's Exhibit

Number 11, the tuition request, would you look on that form, the first form and give us the date of submission to you for the request prior to taking the courses?

A:It's not indicated. There are dates on here but there is no time stamp. I couldn't tell you when these were submitted.

As you know, we had one incident where you predated one of these forms...line 8...

Q:Would you give us the date of your first signiture, one signiture which you made on that form?

A:There is no date next to my signiture on the first form. There is on the second, 7-28-80...page 10 line 1...

Q:Mr. Griffin, for the sake of economy here and our time, could you give us the date of the initial request to you and the date of approval?

A:For which one, sir?...line 14...

Q:Then we will look just at one transaction which we will one request for tuition.

What was the date of the initial request to you for the tuition, that one

form?

A:Any particular one of these forms? There is--

Q:The first form, the first series, the first set of transactions.

A:There is no date on either one of these first two forms on when they were submitted.

Q:Is the first two forms considered to be a part of the transaction which is addressed in the next form, the third form?

A:No.

Q:Mr. Griffin, which form has a date on it?

A:They all have dates, but they have dates on when the courses were scheduled, not when the forms were submitted and approved.

Q:Mr. Griffin, what--could I have the form? Which form has a date on when they were submitted and approved?

A:There is no dateon when they were submitted.

Q:Is there a date next to your name, your signiture?

A:Yes, that's the date when they were approved finally.

Q:Is there a date next to the date of submission?

A:No.

...line 15...

Q:Mr. Griffin, you just testified a short time ago that you have a form there which has an approval date on it.

A:Final approval.

Q:What is the date given next to that date for final approval?

A:That date is meaningless unless you reference it to the semester for the course being taken.

Q:When's the date given next to your name for final approval?

A:I finally approved the date next to my name, and there are two dates there, and the final date is 7-28-80.

Q:And you said a final date. Is there another date there also?

A:There is a whole bunch of dates. There is one for 1-7-80, one for 5-17-80, another one for 1-11-80...line 17...

Q:Mr. Griffin, looking at the form which Ijust handed back to you, which is Plaintiff Exhibit Number 11, what's the date that's-- does it show on the form?

A:This form is not Plaintiff Exhibit 11.
Plaintiff's Exhibit 11 is seven individual forms.

Q:While looking at the document which I handed to you which is identified as Plainitff Exhibit Humber 11, and the pages are setting in front of you.

A:It's not marked as a page. Do you want to mark it as a page?

Q:I don't want to make as a page. Looking at the page that's sitting in front of you does it show the date that the course was started for Municipal Court Practice?

A:Yes.

Q:What is the date?

A:1-7-80.

Q:Does it show the date completed for Municipal Court Practice?

Q:What is that date?

A:5-17-80.

Q:Does it show the date it was submitted for preapproval?

A:No.

Q:Looking in the lower right-hand corner, Mr. Griffin, where your signiture is--

A:Yes.

Q:-- does it show the date of preapproval?

A:No....page 14 line 2...

Q:Does it show the date of preapproval?

A:No.

Q:Mr. Griffin, I believe you are looking at that form there and it shows a date of perapproval is 1-8-80.

A:The left-hand side, yes excuse me, it does show preapproval is 1-8-80.

Q:Do you see the box where it says preapproval?

A:Yes.

Q:Beneath that box do you see your signiture?

A:Yes, in that box, yes.

Q:And do you see right next to that box the date which you wrote in of 1-8-80?

A:Yes.

Q:Looking to your right-hand side, the date of approval, what is that date?

A:It's a little illegible. It looks like 7-28-80.

. . .

TRIAL TRANSCRIPT

Reference R1

Vol. II page 91 line 7:

Q:May I approach the witness?

Mr. Griffin, showing you what's been marked as Plaintiff's Exhibit Number 21, what's the subject of the note attached to that exhibit?

A:This is from me to you. It says-- it's a whole raft of documents.

Q:What does the note say?

A:"Per discussion, please get back to me at your conevnience with any questions. WLG."

...page 92 line 2...

Q:Why did you send that note to Mr. Smith?

A:To have him read it.

Q:Was that so that he could become aware of the new policy for performance appraisals?

A:Probably one of the reasons, yes.

...line 8...

Q:What is the title of that book?

A:Employee and Supervisory Guide to Performance Appraisals.

Q:Looking in that guide, looking at item

number 5, what does item number 5 state?

A:"The quarterly and/or annual reviews of these objectives or goals is a form of performance appraisal but does not do the complete job (and employee perceptions confirm this)."

...Page 93 line 15...

Q:"When the supervisor has completed the documentation, it is given to the employee for his/her signature."

A:That's a guideline.

Q:How many times did you give a performance appraisal from Mr. Smith for his signature?

A:I will have to stand on I think either two or three times....

...line 24...

Q:During the entire two years.

A:At least twice, maybe three times.

Reference R2

Vol. II page 172 line 1 (Mr. Maidman)

Q:Did Mr. Griffin write your performance appraisals?

A:I believe he would.

Q:Were they given to you on a yearly basis?

A:At least on a yearly basis.

Reference R3

Vol. II page 93 line 18 (Mr. Griffin)

Q:How many times did you give a performance appraisal from Mr. Smith for his signiture?

A:I will have to stand on I think either two or three times...

...line 24...

Q:During the entire two years.

A:At least twice, maybe three times.

...Page 96 line 20...

Q:Thank you

Mr. Griffin, reviewing that Exhibit 12, would you see if you could locate performance appraisals that you gave Mr. Smith?

A:There's about four of them here.

...Page 97 line 25...

Q:Which types of reviews?

A:We call them performance appraisal salery reviews. It's the same thing.

Q:This is a salary review; is that correct?

A:They're performance appraisals...

...Page 98 line 18...

Q:Was that signed by Mr. Smith?

A:No. It's signed by myself and my supervisor Mr. Remington.

Q:So there was no actual verbage communication which required a signiture on that, those four forms that you addressed?

A:These four, no.

Reference R4

Vol. VII page 163 line 21 (Mr. Amundson Personnel)

Q:Mr. Amundson, looking back from the present to the past, what is the most recent salary recommendation in that form, the most recnt sir?

A:The most recent is June 16, 1980.

Q:What percentage is that increase?

A:The percentage increase is 5.8 percent.

Q:How many months is that?

A:4 1/2 months....

...Page 164 line 8...

Q:In 4.5 months. Just again was that June 16, 1980 for that increase?

A:You mean for Robert Maidman?

Q:Yes, sir.

A:The date on that is June 16, 1980.

Q:Looking at Plaintiff's Exhibit-- I mean Defendants Exhibit AA, I understand that is the salery change notice for Mr. Smith?

A:That is correct.

Q:What is the salary increase in that one, sir, percentage

A:The percentage is 4.85percent.

Q:4.85, and how many months sir?

A:8.5 months.

Q:Going back again to Mr. Maidman's salary, would you look at the next salary increase, sir?

A:Yes.

Q:And when did that take place?

A:Effective date was February 1st, 1980.

Q:How much was that salary increase?

A:13 percent.

Q:How much time, sir?

A:10 months.

...line 10...

Q:Defendants' Exhibit Z is for Mr. Smith. What's amount of increase in that one?

Let me rephrase that.

When was that increase given?

A:That increase was given on November 1st, 1979.

Q:How much was that increase?

A:Percent of dollars?

Q:Percent, sir.

A:8 percent.

Q:How much time?

A:12 months.

Q:Going back to Mr. Maidman's documents, are there any other salary increases in that document?

A:No, there are not.

Reference R5

Vol. II page 168, Line 20 (Mr. Maidman)

Q:To your knowledge, do you think Mr. Smith did his job?

A:It was my opinion that he handled his responsibilities competently, the ones I knew of. Never having seen a job description, so, I wouldn't be totally knowledgeable of what they all were.

Vol. III page 48 line 12 (Mr. Jensen Corporate Counsel

Q:Mr. Jensen, at all times when working with Mr. Smith, was he professional and competent in your perspective?

A:I would say yes. Based on my contact with Mr. Smith, I would say that.

Q:Did he treat you in a friendly and courteous manner?

A:Yes, sir.

Q:Did you observe him treating others in a friendly and courteous manner?

A:Yes.

Q:In your trips to Washington, D.C. in working with the United States Government, did you observe him working with these people?

A:Yes.

Q:Did he work efficiently and effectively with those people?

A:Yes, I would say so.

Q:Did he treat them in a courteous and friendly manner?

A:Yes, sir...

Testimony Robert Maynard Honeywell General Counsel and Mary McCormick Honeywell Counsel

Reference R6

Vol. III page 10 line 2 (Mr. Amundson Director of Employee Relations)

Q:Let me ask the question again.

Does Honeywell have a performance appraisal for employees?

A:Does it have?

Q:Yes.

A:We make a recommendation based on the supervisor's discussion on the performance of the employee.

Q:Okay. Now this performance appraisal will have some impact upon the salary of that employee; is that correct?

A:That is correct.

Q:This performance appraisal will also have some impact upon the promotional opportuities of the employee is that correct?

A:That is correct.

...Page 11, line 14...

A:A supervisor's performance appraisal will affect the career of the employee is what I testified to a moment ago.

Q:Okay. Mr. Amundson, In Honeywell Corporation does the supervisor's comments about an employee affect a potential transfer of the employee?

A:Are you using comments in the context of performance appraisal?

Q:Yes.

A:I just testified to that a second ago. Yes, a supervisor's performance appraisal can impact the career of an employee.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Alvin W. Smith, Plaintiff-Appellant

vs.

Honeywell, Inc., et al., Defendants-Appellee.

BRIEF OF PLAINTIFF-APPELLANT
No. 83-1744-MN

Page 1

. . .

On October 25, 1982 (the last day to amend the U.S. Magistrate's recommendation), plaintiff's attorney, Steven M. Goldfarb, abandoned this case. The plaintiff thereafter acted in a "pro se" capacity.

. . .

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IV THE U.S. DISTRICT COURT SHOULD HAVE GRANTED NEW TRIAL FOR SECTION 1981 TRIED TO THE JURY BECAUSE:
D. THE PLAINTIFF PRESENTATION OF HIS CASE TO THE JURY WAS PREJUDICED BY THE DISPARAGEMENT BY THE U.S. MAGISTRATE.

SUMMARY:

During the course of the jury trial

the U.S. Magistrate disparaged plaintiff while plaintiff (who was acting in a pro se capacity)was on the witness stand. The result of this was to prejudice the plaintiff case in the minds of the jury...

Argument

Due to rather unusual circumstances, plaintiff found himself in the position of having to act in a "pro se capacity during the conduct of the trial...

. . .

Dated:February 6, 1984

/s/ Alvin W. Smith

IN THE

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. . .

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E. SHOULD PLAINTIFF'S INADVERTENT MISTAKE OF NOT RAISING A RULE 51 MOTION BE HELD AGAINST HIM WHEN HE WAS FORCED TO ACT AS HIS OWN ATTORNEY AND THERE WERE OMMISSIONS IN THE JURY INSTRUCTIONS?

1. Summary:

Plaintiff was forced to act as his own lawyer during trial. He had only sporatic legal consultation. His failure to raise objections to the jury instructions was due to his lack of knowledge about the Rule 51 provisions. If he knew about the rule he would have raised the appropriate objection.

The Court of Appeals should consider the Magistrate omission as a fatal error.

2. Body:

Plaintiff's attorney of 18 months suddenly abandoned the case just before trial. He abandoned the case without permission of the Court and in violation of the employment contract. He abandoned the case at a time when plaintiff was forced to immediately take over the case pro se to make a timely motion.

Plaintiff could not find an attorney to take over the case after 18 months of discovery and just before trial. Plaintiff was therefore forced to go to trial pro se and make all subsequent motions.

On the day of the trial, plaintiff managed to hire an attorney as an consultant. On page 2 of his Findings, the Magistrate rightfully stated that plaintiff was "assisted by experienced trial counsel only sporadically". This underrepresentation was manifested by errors at trial, errors in motions, and all subsequent briefs.

Plaintiff is a computer expert and not an attorney.

. . .

Plaintiff not being an attorney was not even aware of this objection. The objection would have been made had he been aware of its existance. Indeed, the plaintiff proposed jury instructions contained the correct structure...There all ten of the issues are presented.

The plaintiff request that the Court of Appeals review again his concerns about the exclusions in the jury instructions by giving him the benefit of the doubt that he would have made the correct procedural objection had he been aware of their existance. As stated at the start of this brief, it is very difficult to present a case when one is forced to act as his own attorney while not being a professional attorney but rather a computer expert....

Dated: June 24, 1984

/s/ Alvin W. Smith